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In the Supreme Court of the United States

OCTOBER TERM, 1984

GUSTOF CHARLES FEYERS AND
GABRIELLE FEYERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances of this case, a suit against the United States by an employee of an independent contractor challenging the reasonableness of the government's supervision of his employer's operations is barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-25a) is reported at 749 F.2d 1222. The opinion of the district court (Pet. App. 2a-15a) is reported at 561 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on December 12, 1984. The petition for a writ of certiorari was filed on March 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Gustof Feyers and his wife brought this action against the United States under the Federal Tort Claims Act (28 U.S.C. 2671 *et seq.*), seeking damages resulting from a workplace accident.[1] Following a bench trial, the

[1]For simplicity, "petitioner" will be used to refer to Mr. Feyers.

United States District Court for the Eastern District of Michigan granted judgment in favor of petitioners for $480,000 (Pet. App. 1a, 2a-15a). The court of appeals reversed on the ground that the suit was barred by 28 U.S.C. 2680(a), the discretionary function exception to the Act's waiver of sovereign immunity (Pet. App. 16a-25a).

1. At the time of the accident, petitioner was employed as a maintenance worker by Chrysler Corporation at the Detroit Arsenal Tank Plant. One of his duties was to switch railroad flatcars. Petitioner was injured when a fellow employee mistook another crew member's hand signals and prematurely backed two cars together while petitioner was between them adjusting their coupling mechanism. Pet. App. 17a.

Chrysler operated the plant as an independent contractor pursuant to an agreement with the United States. The contract imposed on Chrysler the duty to " 'maintain[] a safety program in [its] areas of responsibility' " (Pet. App. 18a). The government took responsibility for areas of the Army's Detroit Tank Automotive Command (of which the plant was a part) that remained under its control (*ibid.*). Because government negotiators determined that "Chrysler was a prudent contractor capable of implementing its own safety program" (Pet. App. 25a; footnote omitted), they required Chrysler to " 'endeavor to maintain the maximum degree of safety at all times in the operation of [the] plant' " (*id.* at 18a n.2), reserving to the government only the right to " 'make periodic spot reviews of [Chrysler's] safety coverage' " (*id.* at 18a).

In accordance with these provisions, government safety officers monitored Chrysler's operations on an extremely limited basis; their primary responsibility was for the safety of the Army's 5,500 own employees at the Tank Command and of federal employees at installations in neighboring

states (Pet. App. 19a; C.A. App. 153). The government did not supervise Chrysler's training program or provide safety training to Chrysler's employees (Pet. App. 19a). Rather, government officials toured the plant once each year in the company of Chrysler employees, observing whatever work was then in progress (*id.* at 19a-20a). Government safety officers also investigated accidents that came to their attention, but even these investigations could only be performed with a Chrysler escort (*id.* at 20a & n.3). Although they could report safety problems to Chrysler, government safety officers had no authority to require the firm to make any changes in its operations (*id.* at 19a). Procedures in the railyard had not been reviewed prior to petitioner's accident, which was the first that occurred there, and government officials were unaware of any unsafe practices in that area (*ibid.*; C.A. App. 196, 224-225).

2. The district court concluded that the United States was liable under a Michigan doctrine that "places a nondelegable duty upon a principal to see that inherently dangerous activities [such as railcar switching] conducted by his contractor are performed with the requisite degree of care" (Pet. App. 13a). The district court also reasoned that the government was liable because it had failed to exercise its control over the independent contractor "to require necessary safety precautions" (*ibid.*). The district court did not discuss the discretionary function exception (see *id.* at 20a-21a).

3. While the appeal was pending, this Court decided *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines),* No. 82-1349 (June 19, 1984). In *Varig Airlines,* the Court held that claims alleging that plane crashes were caused by the Federal Aviation Administration's negligent performance of its aircraft inspection and certification functions were barred by the discretionary function exception. Relying on *Varig Airlines,* the court of

appeals rejected petitioners' contention that their claim was not within the discretionary function exception (Pet. App. 20a-25a). The court of appeals concluded (*id.* at 24a) that the government's "decisions to delegate safety responsibility to Chrysler, to conduct only 'spot checks' of Chrysler's safety programs, and to not institute a safety training program for railyard workers are clearly the type of discretionary functions protected by 28 U.S.C. § 2680(a)." In particular, the design and extent of the government's supervision program represented, "in essence, a policy decision, involving the exercise of discretion" (Pet. App. 24a), as did the decision to delegate responsibilities to Chrysler based on the government's perception of the firm's capabilities and its regard for safety considerations (*id.* at 25a). The court also noted (*id.* at 25a & n.7) that the relevant safety manual did not prescribe mandatory procedures for the railyard.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

The acts complained of by petitioners plainly "are of the nature and quality that Congress intended to shield from tort liability" through the discretionary function exception (*Varig Airlines,* slip op. 15). Contrary to petitioners' contention (Pet. 19), the decisions of the safety officers in this case were hardly analogous to those made in the course of "operating a mail truck." Government officials were charged here not with the execution of a simple, mandatory procedure, but with the exercise of judgment concerning how closely and in what manner to oversee an independent contractor's safety operations at a large and complex plant.[2] As the Court stated in *Varig Airlines* (slip op. 21),

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[2]Petitioners assert repeatedly (*e.g.*, Pet. 10, 11, 12, 13, 14, 17) that the government was negligent and violated a duty owed to Chrysler's employees. This is of course irrelevant — the discretionary function

decisions regarding "the extent to which [the government] will supervise the safety procedures of private individuals" are clearly within the discretionary function exception.

Petitioners seek to avoid this result by urging that *Varig Airlines* is limited to those situations where an agency is regulating private conduct. This distinction fails for several reasons. First, although *Varig Airlines* arose in a regulatory context, the Court's decision is not limited to such circumstances. The Court made it clear (slip op. 15) that governmental regulation was a sufficient, but not a necessary, condition for application of the discretionary function exception.

Second, nothing in the discretionary function exception itself suggests, as petitioners claim (Pet. 14), that "the shield Congress erected * * * is abandoned" when the government undertakes proprietary activity for its own benefit. The language of 28 U.S.C. 2680(a) does not make such a distinction, and it has no necessary relevance to the discretionary quality of a government employee's acts. Indeed, the Court in *Varig Airlines* (slip op. 11) quoted legislative history specifying that " 'administrative action not of a regulatory nature, such as the expenditure of Federal funds [or] the execution of a Federal project,' " is within the exception. As the Court stated in *Dalehite* v. *United States,* 346 U.S. 15, 35-36 (1953) (footnote omitted), the discretionary function exception "includes determinations made by executives or administrators in establishing plans, specifications or

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exception applies "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). See *Dalehite* v. *United States,* 346 U.S. 15, 33 (1953). Thus, in *Varig Airlines* (slip op. 17 n.12), the Court was willing to assume that the government had violated the "Good Samaritan" doctrine recognized in California tort law.

schedules of operations. Where there is room for policy judgment and decision there is discretion." [3]

Finally, even if there were some merit to the regulatory-proprietary dichotomy, this case fits better in the former category. The government had not assumed direct operational responsibility for the conduct that caused petitioner's injury, but rather was charged only with failing properly to supervise a private person's conduct. This is precisely analogous to the failure to supervise alleged in *Varig Airlines* (see slip op. 16-22). Compare *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) (government's negligent operation of lighthouse); *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1147-1148 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (government's negligent provision of erroneous air-traffic information). Indeed, because the government did not have authority to order changes in Chrysler's safety procedures (see page 3, *supra*), petitioners' claim that the government should have done more than it did may implicate an even greater quantum of discretion than that involved in *Varig Airlines*.

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[3] In *Dalehite*, the Court applied the discretionary function exception to a fertilizer procurement and shipping program undertaken by the government (346 U.S. at 19). The exception applied not only to the decision to institute the program but also to the government's alleged failure, as here, properly to supervise the operational details of the program (*id.* at 38-44).

Had Congress wished to limit the discretionary function exception to regulatory activities, it need not have enacted 28 U.S.C. 2680(a), for 28 U.S.C. 2674 already limits the government's liability to that of "a private individual under like circumstances." See also 28 U.S.C. 1346(b) (government liable only to the extent that "a private person[] would be liable * * * in accordance with the law of the place where the act or omission occurred"). The United States therefore may not be liable under the Federal Tort Claims Act for negligent performance of its regulatory functions, which have no counterpart in the private sector. Cf. *Art Metal-U.S.A., Inc.* v. *United States*, No. 83-2243 (D.C. Cir. Feb. 12, 1985), slip op. 11-13 (government may not be liable for violating its own regulations).

In short, Congress retained the government's immunity with respect to "policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer * * * and the efficient allocation of agency resources" (*Varig Airlines*, slip op. 22). Petitioner cites no post-*Varig* case to the contrary.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]"[P]re-*Varig* cases on the discretionary function must be re-evaluated." *General Public Utilities Corp.* v. *United States*, 745 F.2d 239, 246 n.8 (3d Cir. 1984), cert. denied, No. 84-790 (Feb. 19, 1985); see also *Hylin* v. *United States*, 755 F.2d 551 (7th Cir. 1985) (applying discretionary function exception on remand following *Varig Airlines*). In *McMichael* v. *United States*, 751 F.2d 303 (8th Cir. 1985), the court of appeals held that the discretionary function exception did not apply to a claim that the government had failed properly to supervise its independent contractor's activities. Although we believe that *McMichael* was wrongly decided, that case does not conflict with the court of appeals' decision here because of the significantly greater degree of discretion afforded the safety officers in this case. In *McMichael*, unlike in this case, the inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments (*id.* at 307). The court of appeals in this case distinguished an earlier opinion in the *McMichael* litigation, *Madison* v. *United States*, 679 F.2d 736 (8th Cir. 1982), on the ground that no "mandatory guidelines or regulations [were] violated" here (Pet. App. 25a n.7).